

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

GARY ALLYN SMITH,

Defendant-Appellant/Cross-Appellee.

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UNPUBLISHED

July 30, 1999

No. 209613

Ottawa Circuit Court

LC No. 97021201

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), involving a four-year-old child. Defendant was sentenced as an habitual offender-third, MCL 769.11; MSA 28.1083, to six to fifteen years' imprisonment. Defendant appeals as of right, and the prosecutor has filed a cross appeal challenging defendant's sentence as disproportionately low. We affirm defendant's conviction but remand for further proceedings.

Defendant first argues on appeal that the trial court improperly relied on information outside the record and acted as an expert witness when it stated that "'keep it a secret' is a trademark of child molesters," thus violating defendant's constitutional rights and causing prejudice to defendant. We find this issue to be without merit. There was evidence at trial that defendant told the child to keep the sexual assault a secret, but no evidence was presented concerning any "trademark" of child molesters. There was also evidence that defendant was a frequent and trusted visitor to the child's home and that the child called him "uncle." Defendant acknowledged being alone with the child on many occasions, and, although he denied that there was a sexual purpose, defendant admitted touching the child's penis. The child, despite his extreme youth, never wavered from his testimony that defendant sucked on his penis, and the trial court specifically found beyond a reasonable doubt that defendant placed the four-year-old victim's penis in his mouth. This finding was sufficient to support defendant's conviction. It appears that the trial court's remark about a "trademark," which was not used as a basis for its conclusion, was merely a descriptive manner of emphasizing the secretive nature of sexual abuse of children. Even assuming arguendo that the trial court was somehow assuming facts that are not

grounded in common sense, we find no prejudice in this case. *People v Grable*, 57 Mich App 184, 186-187; 225 NW2d 724 (1974); *People v Green*, 21 Mich App 575, 577-578; 175 NW2d 521 (1970).

Defendant also argues that there was not sufficient evidence of penetration to support his conviction. We find defendant's contention that "sucking" might not involve penetration to be without merit. Viewing the evidence that defendant sucked on the child's penis in a light most favorable to the prosecution, and permitting reasonable inferences from the facts, we believe a rational trier of fact could have found defendant guilty of first-degree criminal sexual conduct beyond a reasonable doubt. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

Defendant argues that testimony from the victim's mother regarding statements made to her by the victim was improperly admitted. We do not agree. MRE 803A, Michigan's "tender years exception" to the hearsay rule, allows admission of certain corroborative statements when the statements are "shown to have been spontaneous and without indication of manufacture." Here, the mother testified that the child victim told her about the incident and then said, "oops," and remembered that the information was "secret." The mother asked the child to show her what happened, along with a number of other non specific, open-ended questions. The trial court did not abuse its discretion in admitting the statements at issue pursuant to MRE 803A. *People v Dunham*, 220 Mich App 268, 271-273; 559 NW2d 360 (1996). Moreover, defendant was tried at a bench trial, and it is clear from the trial court's findings that it gave little weight to the mother's testimony. Accordingly, even if some of the corroborative statements were improperly admitted, we find no prejudice. *People v Bartlett*, 231 Mich App 139, 158-159; 585 NW2d 341 (1998).

There is no merit to defendant's claim that reversal is required because of the cumulative effect of the previous alleged errors.

The prosecution argues by cross appeal that defendant's sentence was disproportionately low. Unfortunately, the trial court did not articulate a basis for defendant's sentence, and we cannot ascertain from the record why the trial court believed a sentence of six to fifteen years was appropriate in this case.

This was defendant's third conviction for first-degree criminal sexual conduct involving young children. After his two previous convictions, defendant was sentenced to a term of probation, and a term of seven to twenty-five years. The probation department in this case recommended a term of twenty-five to fifty years. Although the record contains numerous statements from people who pledge to support defendant in repudiating a homosexual orientation, there is nothing to indicate that defendant has any understanding of the pedophilia at issue here. Indeed, in his testimony at trial defendant discussed his prior convictions and what he had learned from them. Defendant suggested that there was a "big difference" between having a sexual relationship with a four-year-old and having such a relationship with a ten-to-fourteen-year old. Defendant acknowledged that it was improper to have sex with children, but still commented that his prior convictions, which he said involved ten to fourteen-year old children, did not involve force and that the sexual contact in those cases was the result of "bonding in a relationship."

In short, there is nothing before us to explain why the trial court may have concluded that a lower sentence was appropriate for defendant's conviction of habitual-third than was imposed for defendant's previous unenhanced criminal sexual conduct conviction. Because we are unable to determine from the record whether defendant's sentence is proportionate, we remand for articulation of the reasons for the trial court's sentence. *People v Triplett*, 432 Mich 568, 569; 442 NW2d 622 (1989); *People v Pena*, 224 Mich App 650, 662; 569 NW2d 871 (1997), modified 457 Mich 883 (1998).

We note that the trial court did not have the benefit of a sentencing information report (SIR), and the prosecutor expressed at oral argument his misconception that sentencing guidelines could not be considered by the trial court in habitual offender cases. Although the sentencing guidelines do not apply to habitual offender convictions, *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996); *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995), the guidelines may be considered by the trial court, *Id.*, *People v Haacke*, 217 Mich App 434, 438; 553 NW2d 15 (1996), and preparation of an SIR is mandatory. *People v Yeoman*, 218 Mich App 406, 419; 554 NW2d 577 (1996); see also Michigan Sentencing Guidelines (2d ed), p1. The trial court may have found the guidelines information useful in this case.

Defendant's conviction is affirmed. This matter is remanded for articulation by the trial judge, within 21 days of the issuance of this opinion, of the reasons for defendant's sentence. The trial court is to forward a transcript of the trial court's articulation to this Court within 30 days after the proceeding is held. We retain jurisdiction.

/s/ David H. Sawyer  
/s/ William B. Murphy  
/s/ Michael J. Talbot